PROVINCE OF PRINCE EDWARD ISLAND

IN THE MATTER OF THE *LABOUR ACT*, RSPEI 1988, c L-1

-AND-

IN THE MATTER OF A GRIEVANCE

BETWEEN

THE UNIVERSITY OF PRINCE EDWARD ISLAND FACULTY ASSOCIATION

Union and Grievor

-and-

THE UNIVERSITY OF PRINCE EDWARD ISLAND
Employer and Respondent

Heard by written submissions

Appearing for the Union/Grievor — Jillian Houlihan

Appearing for the Employer/Respondent — Murray L. Murphy, K.C. CPHR

Arbitrator — Michel Doucet, C.M., O.N.B., K.C., O.F.A.

Date of Decision — August 29, 2024

1. On February 21, 2024, the University of Prince Edward Island Faculty Association ("UPEIFA" or "Association") filed a grievance against the University of Prince Edward Island ("UPEI," "University" or the "Employer".) Specifically, UPEIFA claims that the Employer violated Articles A-2.4, A-3 and A-10 of the Collective Agreement.

2. On March 7, 2024, the Employer dismissed the grievance. The Employer claims that it is within "its management rights to establish a research chair position, define the scope and eligibility for the position, select the successful candidates, and award a research grant."

3. On March 20, 2024, the grievance was referred to arbitration.

4. I was appointed by the parties to hear this grievance. In their correspondence, the parties indicated that they wished to proceed by way of written submissions. I agreed to this procedure.

5. As agreed, UPEIFA submitted its written arguments, documents and authorities on June 28, 2024. UPEI submitted its response to the Association's submission on July 18, 2024. Finally, UPEIFA filed its reply to the University's response on August 2, 2024.

A. FACTS

(i) The Bargaining Unit

6. The UPEIFA is the certified bargaining agent for approximately four hundred and fifty (450) UPEI employees. The members of UPEIFA are primarily engaged in teaching undergraduate and graduate students, conducting scholarly research, and providing a range of services both locally and internationally. The members are divided into two bargaining units: *Bargaining Unit #1,* is comprised of faculty, librarians, sessional instructors, and clinical nursing instructors and *Bargaining Unit #2,* is comprised of clinical veterinary professionals employed at UPEI's Atlantic Veterinary College. This grievance was filed with respect to *Bargaining Unit # 1.*

7. UPEIFA and UPEI are parties to a Collective Agreement for *Bargaining Unit # 1* (the "Collective Agreement") with a term from July 1, 2022, to June 30, 2026.

(ii) University Research Excellence Chair Program

8. The issue in this grievance concerns the announcement of the creation of a new "University Research Excellence Chair" ("UREC" or "Program".) This announcement was made on January 10, 2024, by the University's Vice-President, Academic and Research, Dr. Greg Naterer, in an email forwarded to all faculty members. More specifically, this email stipulated as follows:

> In the *UPEI Strategic Research Plan (2023–2028): Roadmap to Research Excellence*, one of the thematic goals is to expand research capacity by developing new resources that increase the number of research chair positons at the University. UPEI's reputation and research profile, nationally and internationally, are largely influenced by the scholarly accomplishments of its professors.
>
> A new title of "University Research Excellence Chair" (UREC) will be created at UPEI to recognize the exceptional research achievements of faculty members. Selected chairholders are outstanding researchers, either early career researchers who are emerging scholars, or already established as leaders in their respective field of research.
>
> A faculty member holding the title of University Research Excellence Chair will receive an annual grant of $20,000 over a two-year duration of the appointment. Funds may be used toward a salary stipend for the chairholder, teaching release, and/or research grant. One or more appointments will be made each year. If a UREC is awarded another research chair during their appointment, they must relinquish the UREC title and benefits.
>
> A faculty Dean may submit one (non-departmentalized faculties) or two (departmentalized faculties) nominations of faculty members to the Office of the Vice-President, Academic and Research (VPAR), at vpar@upei.ca, **by February 16, 2024**.
>
> The Research Advisory Committee (RAC) will review proposals and make recommendations to the VPAR. A nomination includes a curriculum vitae and brief one-page summary of the nominee's most significant research contributions, along with any other documentation the Dean requires to make a compelling submission.
>
> The Chair program is committed to the *UPEI EDI Strategy* which advances equity, diversity and inclusion within the University community. Decision makers will follow the *Tri-Agency's best practice assessment guidelines* to ensure that determinations of excellence are not limited to traditional and narrow perspectives (including in the review of Indigenous research).

9. The Terms of Reference for the UREC program was posted on the UPEI's website on an unspecified date. The Terms of Appointment on the website provided as follows:

> A faculty member holding the title of University Research Excellence Chair will receive an annual research grant of $20,000 for the two-year duration of the Chair appointment. Funds are provided toward a research grant for the chairholder.

> The research grant funds may be used for stipends of research trainees, operating funds for research activities (materials, supplies, equipment, professional / technical services, consulting fees), computers, electronic communication, dissemination of research results, page charges for published articles, research support (promotional materials, patent applications, pre-commercialization services, licensing tees), books and periodicals.
>
> The Chair title and research grant are relinquished if another research chair appointment is awarded. One or more appointments will be made each year. The duration of the Chair appointment is two (2) years, with an expectation that the chairholder will seek other partner opportunities to transition the Chair to another external source of funding after the period of the chairship.

10. On January 11, 2024, the day after the announcement, UPEIFA wrote to the Vice-President to express its objection to the way that UPEI had proceeded with the Program. More specifically, it claimed that UPEI had not negotiated the terms of reference of the Program with the Association and that the Terms of Reference posted on the University's website were different from those in the initial announcement.

11. On January 19, the Vice-President advised UPEIFA that the University would proceed with the program as announced as it was within its management rights to do so.

B. SUBMISSIONS

(i) The Submissions of UPEIFA

12. UPEIFA claims that the Employer did not negotiate the terms of reference for the Program. In fact, it argues that UPEI did not give the Association any advance notice that it intended to create the Program. UPEIFA states that it learned of the Program at the same time as its members on January 10, 2024, when the email of Dr. Naterer was sent out.

13. According to the Association, the Employer disregarded and bypassed the exclusive bargaining agent role of the Association by unilaterally implementing the Program. It adds that the exclusive role of a bargaining agent is "foundational" to collective bargaining relationships, and it is enshrined in the recognition clause of every collective agreement. The recognition clause that is found in this case at Article A-3 of the Collective Agreement clearly defines that the UPEIFA is the bargaining agent for its members.

14. The Association states that the recognition clause changes the employment relationship from an individual relationship to a collective relationship where individual employees may not make their own bargains or deals with the Employer. UPEIFA argues that the case law is clear that recognition clauses fetter management's ability to negotiate, without its consent, individual agreements with its employees. It further adds that agreements between employers and individual employees should be declared invalid where an employer bypasses the union.

15. UPEIFA argues that the Collective Agreement establishes the entire scheme for faculty terms and conditions of employment, including compensation, research grants, and appointments. Since UREC are to be selected from faculty members, the Association claims that the terms and conditions of their appointments cannot be unilaterally set by the Employer or negotiated between the Employer and the appointee. The terms and conditions must be negotiated between the Employer and the Association. By unilaterally introducing this Program, which resulted in the appointment of select faculty members and non-negotiated terms and conditions of appointment, the Association claims that the Employer violated Article A-3 of the Collective Agreement.

16. The Association claims that if the Employer wishes to pay additional compensation or grant other benefits to its members, it must negotiate these terms. This cannot be done outside the Collective Agreement by relying on the principle of management rights. It adds that management rights must be exercised in a manner that is consistent with the Collective Agreement, which includes the recognition clause. Compensation, research grants, and internal appointments are all matters over which the Association claims to have the exclusive right to bargain. UPEIFA argues that this is reflected in the existing provisions of the Collective Agreement and affirmed by the case law. Therefore, according to the Association, since the Program deals with the terms and conditions of employment of bargaining unit members, it must be the subject of negotiations between the Employer and UPEIFA.

17. For the foregoing reasons, UPEIFA claims that the Employer violated the Collective Agreement. It adds that to allow it to continue to do so would violate the Association's exclusive role and allow the Employer to bypass and diminish its role.

18. The Association therefore request that the following redress be granted:

- A declaration that the Employer violated Articles A-2.4, A-3 and A-10 and any other relevant Article of the Collective Agreement; and
- a ruling that the Employer will negotiate a Memorandum of Understanding with the Association outlining the terms and conditions of these new positions.

19. In support of its arguments, UPEIFA referred to the following decisions: *Bernard v. Canada (Attorney General)*, 2014 SCC 13; *HREU, Local 448 v. Millcroft Inn Ltd*., 2000 CanLII 12208 (ON LRB); *Allen v. Alberta*, 2003 SCC 13; *Berry v. Pully*, 2002 SCC 40; *University of British Columbia Faculty Assn v. University of British Columbia*, 2004 CarswellBC 1622; *CKF Inc. and TC, Local 213 (Hiring Incentive), Re*, 2022 CarswellBC 2120; *Toronto Hydro v. CUPE, Local 1*, 2002 CarswellOnt 2762; *Cape Breton University Faculty Association v Cape Breton University*, 2016 NSLB 243; *University of Manitoba Faculty Association v University of Manitoba*, 2017 Canlll 69084; and, *CUPE, Local 1190 v. New Brunswick (Transportation and Infrastructure)*, 2022 CanLII 112126 (NB LA).

(ii) Submission of the Employer

20. For its part, UPEI claims that it is empowered to create and implement the Program by operation of the management right clause contained in Article A-10 of the Collective Agreement. In the alternative, if the Collective Agreement is determined to be ambiguous in regard to the interpretation of Article A-10, then UPEI claims that it can create and implement the Program as a result of the existing longstanding past practice at the University of awarding research grants to faculty members.

21. The Employer recognizes that the UPEIFA is the sole and exclusive bargaining agent of the unit defined in the Order of Certification (File No. 01-001) of August 2, 2001, issued by the Prince Edward Island Labour Relation Board, save and except for the excluded positions outlined in Appendix 1 of the Minutes of Settlement (Schedule Il) jointly filed to the Labour Relations Board on July 20, 2001. It also acknowledges that this recognition provides UPEIFA with exclusive representation rights over the relevant bargaining unit and vests it with exclusive authority to negotiate the rights of its members.

22. The Employer claims that the parties do not disagree about the general principles regarding the recognition clause. However, it argues that they do disagree with respect to the application of these principles. As to UPEIFA's claims that the recognition clause fetters its ability to negotiate individual agreements with its employees without first getting the consent of the Association, the Employer argues that this is a fundamental misunderstanding of the effect of the management rights clause.

23. UPEI claims that Article A-10 of the Collective Agreement grants it residual rights. More specifically, the Employer refers to the part of this article that states that "all the functions, rights, powers and authority which are not specifically abridged, delegated or modified by this Agreement are recognized by the Association as being retained by the Employer." According to the Employer, the residual powers granted by this article gives it the right to determine how to exercise its management rights, unless there are specific restrictions in the Collective Agreement or law preventing it from doing so.

24. The Employer notes that the cases referred to by the Union in its written submission do not apply to the new Program it has created and can all be distinguished on their facts. Furthermore, it adds that UREC is a unilateral appointment, not an agreement, and it, therefore, does not conflict with Article 3.2 of the Collective Agreement. It also claims that there is no obligation on a successful recipient to accept an appointment.

25. Lastly, the Employer claims that the Program does not conflict with the terms of the Collective Agreement. Moreover, it adds that there is nothing in the Collective Agreement that deprives UPEI of the right to create such a Program and determine its appointment process. If the parties intended for internal appointments to be within the ambit of the UPEIFA's "rights, powers and authority," then the Employer claims that this intention would have been specifically provided for in the Collective Agreement. As it is not, the Employer argues that creating the Program is a proper exercise of its management rights and does not violate the provisions of the Collective Agreement.

26. For these reasons, the Employer claims that no article of the Collective Agreement expressly circumscribes its ability to create the Program. It is consequently UPEI's main position that the Collective Agreement is unambiguous, and that the creation of the Program is a valid exercise of its management rights. However, should I determine that the Collective Agreement is ambiguous, it then claims that the existing longstanding past practice surrounding the awarding of grants should result in a finding that the University has not violated the Collective Agreement.

27. By way of example of this longstanding history, the Employer mentions that since 2005, the University has awarded Research Professorships under the *Jeanne and J.-Louis Levesque Endowment for Nutrisciences and Health Research* "to provide successful recipients both with research grant funds as

well as a course release to pursue research in nutrisciences and health." It adds that UPEI selects the successful recipient for this research grant and that UPEIFA is not involved in the awarding of the grant to successful recipients.

28. The University further indicates that in 2012 and for years prior to that, it allocated large budgets toward internal research grants. The Guide to *UPEI Research Funding,* which was in effect during this period, sets out the policies and procedures on research within the University community. During the years in which the policies and procedures contained in this handbook were applied, UPEIFA was not involved in the awarding of funding to successful recipients of research grants.

29. The Employer's evidence also mentions that from 2013 forward, the *Social Sciences and Humanities Research Council of Canada* ("*SSHRC*") *Explore Research Grants* ("*SERG*") and *Internal Research Grants* ("*IRG*") became the two (2) significant programs for research funding at the University resulting in over twenty-five (25) grants being awarded. UPEI adds that it selected the successful recipients for this funding and that UPEIFA was not involved in the awarding of this funding to successful recipients.

30. The University also submits that it awards internal research grants both for *Internal Generative Artificial Intelligence and Assessment Innovations* as well as for pursuits in the scholarship of *Teaching and Learning*. Again, it claims that it selects the successful recipient for these fundings and that UPEIFA is not involved in the awarding of this funding to successful recipients.

31. Also, since 2016, UPEI submits that it awards funding to successful candidates with the *UNESCO Chair in Island Studies and Sustainability* and that it selects the successful recipient for this funding without the involvement of UPEIFA.

32. Finally, the Employer's written submissions refer to additional research chairs that exists at UPEI including the *Margaret and Wallace McCain Chair in Human Development and Health*; the Chair in *Animal Welfare*; the Chair of *L. M. Montgomery Studies, and Applied Communication, Leadership, and Culture*; the *Industry Research Chair in Sustainable Food Automation*, as well as *Fulbright Visiting Research Chairs*. In all these cases, UPEI claims that UPEIFA is not involved in the awarding or allocation of funding.

33. The Employer claims that it has never received a grievance from UPEIFA that its past practice of awarding research funding was unacceptable or that it violated the Collective Agreement.

34. As to the UREC, the Employer claims that it is an internally funded research grant and like all other existing and past research grants awarded by UPEI, the funding is for research activities at the University and is not paid as direct remuneration to successful recipients. It further adds that the Program does not and will not interfere with the recipients' terms and conditions of employment.

35. The Employer states that Research is a central mandate for the University. It adds that UPEI has a longstanding history of allocating grants to eligible candidates to carry out approved research activities. Throughout its history of allocating research grants, UPEI claims that it has unilaterally selected successful recipients for this funding with the tacit acquiescence of UPEIFA. The University therefore argues that should there be a determination that the Collective Agreement is ambiguous in regard to its ability to implement the Program, there is sufficient evidence of past practice to interpret this ambiguity in its favour.

36. For all of the above reasons, UPEI claims that the implementation of the Program is a valid exercise of its management rights under the Collective Agreement insofar as no article within the Collective Agreement "expressly circumscribes" the University's ability to create and implement it. Should it be determined that the Collective Agreement is ambiguous as to whether the creation of the Program is circumscribed by the Collective Agreement, any ambiguity ought to be resolved in favour of the Employer given its longstanding past practice surrounding the awarding of research grants.

37. In support to its arguments, UPEI referred to the following decisions: *Hertz Canada Ltd. v. UFCW, Local 175*, (2009), 181 LAC. (4th) 39; *Canadian Union Public Employees, Local 1870 v University of Prince Edward Island*, 2016 Canlii 153035; *Canadian Union of Public Employees, Local 501 v Chartottetown (City)*, 2012 Canlii 32240; *Ipsco Inc. v. B.S.O.I.W, Local 805*, 2004 CarswellAlta 984; and I.*A.M., Local 1740 v. John Bertram & Sons Co*., 1967 CarswellOnt 782.

(iii) UPEIFA's Reply

38. As to the Employer's argument regarding past practice, UPEIFA claims that the language of the Collective Agreement is unambiguous and, consequently, the condition that an ambiguity must be found before resorting to past practice as an interpretative aid has not been satisfied. It adds that the management

right clause found at Article A-10 of the Collective Agreement is unambiguous and is subject to the recognition clause found at Article A-3. Therefore, management rights must be exercised in a way that is consistent with the exclusive role of the Association as the bargaining agent for its members.

39. UPEIFA further claims that the endowments cited by the Employer as evidence of past practice are externally funded chair appointments. It argues that these appointments are a separate, distinct category from the new internal Program. It adds that the parties have negotiated language in the Collective Agreement for externally funded chairs. It refers in particular to Articles B-2.20, H-1.5 and H-1.7 and the Letter of Understanding No. 2. Therefore, UPEIFA states that the Collective Agreement demonstrates that the terms and conditions of externally funded chairs are matters that the parties have negotiated. It adds that the Terms of Reference of the new Program must also be negotiated between the parties. As such, the Association claims that the Employer's reliance on the alleged past practices with respect to externally funded chairs do not support its unilateral implementation of the Program.

40. It is clear, according to the Association, that there is no past practice that reveals a consensus between the parties which supports the Employer's position that it can unilaterally set and implement terms and conditions of employment for select faculty members. UPEIFA adds that there is nothing supporting the Employer's past practice argument. Rather, the Association claims that the Employer has simply pointed to examples of externally funded chairs, for which the parties have negotiated terms in the Collective Agreement.

41. In arguing that it is within its management rights to unilaterally implement the Program, UPEIFA argues that the Employer ignores the "foundational" role of the Association as the exclusive bargaining agent for faculty members. The Employer's management rights do not permit UPEI, to bargain directly with individual faculty members and appoint them as the Program's chairs. The Association claims that by unilaterally implementing the Program and setting its terms and conditions, the Employer is in breach of the Collective Agreement.

C. RELEVANT PROVISIONS OF THE COLLECTIVE AGREEMENT

42. The relevant provisions of the Collective Agreement for the purpose of this grievance are the following:

A2.4 The Parties agree that they shall exercise their respective rights under this Agreement fairly and reasonably, and in a manner consistent with the provisions of this Agreement.

[…]

A-3 RECOGNITION

A3.1 The Board of Governors recognizes the Association (UPEIFA) as the sole and exclusive bargaining agent for the unit defined in the Order of Certification (File No. 01-001) of August 2, 2001 (Schedule 1) issued by the Prince Edward Island Labour Relations Board, save and except the exclusions listed in Appendix 1 of the Minutes of Settlement (Schedule II) jointly filed to the Labour Relations Board on July 20, 2001.

A3.2 The Board of Governors recognizes the Association as the sole representative of its Members. Furthermore, no Member or group of Members in this bargaining unit shall be required to enter into any agreement with the Employer which may conflict with the terms of this Agreement.

A3.3 The Board of Governors and the Association agree that the application of "Note" in Schedule A of the Certification Order is intended to apply to persons primarily engaged in managerial, administrative or contract professional functions, and in no way prohibits the President, Vice-Presidents, Deans, Associate or Assistant Deans, the University Librarian or bargaining unit members appointed to the Board of Governors from conducting any teaching or professional responsibilities.

[…]

A-10 MANAGEMENT RIGHTS

A10.1 Consistent with the Employer's rights and obligations in law, all the functions, rights, powers and authority which are not specifically abridged, delegated or modified by this Agreement are recognized by the Association as being retained by the Employer.

D. THE QUESTIONS IN ISSUE

43. The questions in issue in this grievance are the following:

(a) Does the Program, as announced by the Employer, violate the recognition clause found at Article A-3 of the Collective Agreement or is it a proper exercise of management rights pursuant to Article 10 of the Collective Agreement?

(b) If the Collective Agreement is found to be ambiguous as to UPEI's ability to create and implement the Program should this ambiguity be resolved in favour of the Employer because of its longstanding past practice of awarding research grants?

E. ANALYSIS

(a) Does the Program, as announced by the Employer, violate the recognition clause found at Article A-3 of the Collective Agreement or is it a proper exercise of management rights pursuant to Article 10 of the Collective Agreement?

44. This is the main issue in this grievance. UPEIFA claims that UPEI disregarded and bypassed its exclusive bargaining agent role as set out in Article A-3 of the Collective Agreement when it unilaterally implemented the Program. It maintains that the exclusive role of a bargaining agent is the foundation of the collective bargaining relationships and is enshrined in the recognition clause of every collective agreement.

45. For its part, UPEI claims that it is authorized to create and implement the Program by virtue of the management right clause contained in Article A-10 of the Collective Agreement.

46. There is no question that the exclusive role of a bargaining unit, such as the UPEIFA, is fundamental to a collective bargaining relationship. In this case, Article A-3 of the Collective Agreement recognizes that the Association as the sole and exclusive bargaining agent and representative of its members.

47. The Supreme Court of Canada, in *Bernard v. Canada (Attorney General),* 2014 SCC 13, declared at paragraph 26, that one of the consequences of a union possessing the exclusive bargaining status on behalf of its members is that it places it on an equal bargaining position with the employer. In support of this principle, the Supreme Court referred to the Ontario Labour Relations Board decision in *HREU, Local 448 v. Millcroft Inn Ltd.*, 2000 CanLII 12208 (ON LRB), where the Board wrote at paragraph 33:

> The establishment of a collective bargaining relationship between a union and an employer entails a change in the employment relationship between the employer and its workers. The change is from an individual to an collective basis of the relationship – the union becomes the agent for the employees and, as such, it is entitled to speak on their behalf as if they were together negotiating as a group. The individual employees may not make their own individual bargains or deals with the employer. To that end, the union is entitled to take full instructions from them and to represent them […]

48. In *Allen v. Alberta*, 2003 SCC 13, the Supreme Court of Canada stated, at paragraph 13, that a certified bargaining agent holds the exclusive bargaining rights in respect to its members and “represents all the members of the unit and negotiates with the employer to arrive at a collective agreement that defines their employment conditions.” The Supreme Court of Canada similarly described the role of unions in *Berry v. Pully*, 2002 SCC 40, at paragraph 51:

> […] The unique status of trade unions is a consequence of the complex labour relations regime governing their existence and operations. By statute, labour unions have been endowed with significant powers and corresponding duties. They are granted the monopoly power to act as the exclusive bargaining agent for a group of employees, and they have a corresponding duty to bargain fairly on their behalf […]

49. The authors Brown and Beatty, also explained the role of the union recognition clause as follows in their book *Canadian Labour Arbitration*, 5th ed., at § 9:2 - Recognition:

> Primary among the guarantees a union negotiates for itself is the union recognition clause. This provision, which invariably is found at the beginning of a collective agreement, recognizes the union as the exclusive bargaining agent for the employees it covers. It is so central to the system of collective bargaining developed in Canada that it is required as a mandatory provision of each collective agreement under labour relations laws. This clause determines the scope of the bargaining unit and the work that falls within the unit. <u>It is this clause that fetters management's ability to negotiate, without the consent of the union, individual agreements with its employees</u>.
>
> <u>Arbitrators have generally been very vigilant in protecting a union's status as the exclusive bargaining agent</u>. Although not all direct communications and meetings between employers and employees are outlawed, agreements between employers and individual employees have been declared invalid where they are inconsistent with the terms of the collective agreement, including those which benefit an employee. Indeed, it has been held that employers and individual employees cannot even negotiate special deals on subjects that are not explicitly covered by the terms of the agreement. […]

[The underlining is mine.]

50. These principles were also reflected in the decision that I rendered in *CUPE, Local 1190 v. New Brunswick (Transportation and Infrastructure),* 2022 CanLII 112126. At paragraph 92 of this decision, I wrote:

> The primary role of a union is to act as the bargaining agent for its members in matter relating to the terms and conditions of their employment. In this regard, the union recognition clause is fundamental. It reflects the foundation of the collective bargaining scheme. Once a union obtains the bargaining rights for a group of employees, it becomes their exclusive bargaining agent in all employment-related dealings with the employer. Hence, an employer cannot deal directly with bargaining unit employees except as allowed by the collective agreement or by other agreements with the union. The union

> recognition clause guarantees that employees will have the support and the advice of their union in situations of actual or potential conflict with their employer, particularly where their employment may be in jeopardy.

51. The role of the union as the exclusive bargaining agent of its employees is also recognized in the Prince Edward Island *Labour Act,* RESPEI 1988, C L-1 at section 10(1)(b), which provides that "No employer […] shall […] interfere with […] the representation of employees by a trade union."

52. As I indicated earlier, UPEI acknowledges that the UPEIFA is the sole and exclusive bargaining agent of the unit defined in the *Order of Certification* (File No. 01-001) of August 2, 2001 (Schedule 1) issued by the Prince Edward Island Labour Relation Board save and except for the excluded positions outlined in Appendix 1 of the Minutes of Settlement (Schedule II) jointly filed to the Labour Relations Board on July 20, 2001. It also acknowledges that this recognition clause provides UPEIFA with exclusive representation over the relevant bargaining unit which in turn vests the Association with exclusive authority to negotiate the rights of its members.

53. The parties do not disagree about the general principles regarding the recognition of the Union as the exclusive bargaining agent of its members. Where there is a disagreement, it is in respect to the application of this principle.

54. The Employer claims that the "Management Rights" clause found at Article A-10 of the Collective Agreement clearly recognizes that it has retained some residual rights. It refers in particular to the part of this Article which states that "all the functions, rights, powers and authority which are not specifically abridged, delegated or modified by this Agreement are recognized by the Association as being retained by the Employer."

55. UPEI also referred to the decision in *Hertz Canada Ltd. v. UFCW, Local 175*, (2009), 181 LAC. (4th) 39, in which Arbitrator Knopf wrote at paragraph 19:

> The parties' relations under a collective bargain begin with the premise that management has the prerogative to operate as it sees fit, unless there are specific restrictions contained in the Collective Agreement, or the law. Unions do not have the same "residual right". The Union's rights and desired terms and conditions must be found in the Collective Agreement or the law. They can only be implied into the relationship on the basis of language achieved in collective bargaining.

56. Mention was also made of the decision in *Canadian Union Public Employees, Local 1870 v University of Prince Edward Island*, 2016 CanLII 153025. This decision was in regard to a policy grievance concerning UPEI application of the posting procedures pursuant to the collective agreement. More specifically, the Employer referred to this decision to emphasize that an employer had the exclusive right to determine how to exercise the powers conferred by the management right clause as long as the exercise of these powers is not circumscribed by express provisions of the collective agreement (see par. 38 of the decision).

57. No one will disagree with the statement of the Arbitration Board in the *University of Prince Edward Island* case. However, the question remains whether there are, in this case, articles in the Collective Agreement that "expressly circumscribe" the University's ability to unilaterally implement the terms and conditions of the Program. UPEI maintains that this program is an internally funded program and that much like all other existing and past research grants awarded by the University, the funding is for research activities at the University and is not paid as a direct remuneration to successful recipients. It adds that the Program "does not and will not interfere with recipients' terms and conditions of employment."

58. For the following reasons, I disagree with the Employer's argument that the unilateral implementation of the terms and conditions of the Program is a proper exercise of its management rights and that it is not circumscribed by the Collective Agreement.

59. The factual evidence that has been submitted through the parties' written submissions indicates that the Chairs of the Program are to be selected amongst faculty members who are also members of UPEIFA and that the terms and conditions for their appointments have been unilaterally set by the Employer.

60. In its written submissions, the Association rightly submitted that it is important to consider the entire context of the Collective Agreement and the types of terms and conditions that the parties have negotiated regard to such matters. As it indicated, the Collective Agreement includes several terms and conditions that relate to scholarly research, research funding, and expenses. It refers in particular to the following:

a. Article A-8.1(b), which states that research and scholarship are among the professional duties and responsibilities of faculty members;

b. Article A-8.3, which provides that scholarly endeavours include the right to conduct research, scholarship, and critical, creative, professional or developmental work, the dissemination of such work through publication, demonstration, presentation, exhibition or performance, or by other means appropriate to the discipline;

c. Article B-2.7 c), which provides that term appointments of faculty members may be made for the purpose of catering to research needs of limited duration that should not result in tenured or probationary appointments;

d. Article B-2.20, which establishes a process for the appointment of a faculty member to an externally funded Chair position;

e. Article C-2.8, which provides that those on sabbatical leave may receive a portion of their sabbatical salary in the form of a research grant provided the faculty member demonstrates to the appropriate research grant committee that such funds are required for the research to be carried out during the leave;

f. Article D-6.4 e), which details the professional development and travel reimbursement available to faculty members, which can be used for expenses directly associated with research;

g. Article D-7, which provides for $2,500 in start-up research funding for new tenure stream faculty members, as well as a program for faculty and librarians to request research grants in lieu of salary;

h. Article E-2.2.1, which sets out the considerations the applicable committees are to take into account when determining appointments with tenure or promotion, including evidence of scholarly endeavours, such as research;

i. Article G-1.11 c) ii), which requires the Employer to contribute $15,000 each year to a fund for grants aiding the scholarly activity of sessional instructors; stipulates who is eligible for the grants; and states that adjudication of applications will be conducted by the Research Advisory Committee;

j. Article G-2.25, which provides that the Employer shall contribute $4,000 each year to a fund to be used for grants aiding scholarly activity, established to support the scholarly research and development of clinical nursing instructors; and

k. Letter of Understanding No. 2 that concerns the terms and conditions applicable to Canada Research Chairs, including the appointment process, the composition of the review committee, the responsibilities of these faculty members, and the promotion process.

61. UPEIFA also referred to the following Articles of the Collective Agreement that contains provisions regarding workload and course releases:

a. Article H-1.2 provides that research is one of the factors Department Chairs must consider when determining the teaching workload of a faculty member;
b. Article H-1.5 sets out the terms and conditions for "Teaching Workload Reductions for Scholarly Endeavours and University Service," which includes the newly negotiated language in Article 1.5.3 which provides for a course release for faculty that hold an external research grant of at least $20,000;
c. Article H-1.7 provides that faculty members appointed to special externally funded named Chair positions or similar positions, where the expectation is that the Chair holder will predominantly be involved in research, shall teach the number of courses per year agreed to at the time of the appointment; and
d. Article H-1.12.5 provides for workload reductions for librarians who wish to undertake further study.

62. The Employer responded to this argument of the Association by maintaining that these Articles of the Collective Agreement did not "expressly circumscribe" the University's ability to create the Program. I do not disagree with the Employer's argument that the articles referred to by the UPEIFA do not prevent it from creating the Program. However, the issue is not with the creation of the program, but with the terms and conditions of its implementation.

63. First of all, I do not accept the Employer's argument that the Program is "a unilateral appointment" and, therefore, not an "agreement." Even if the Employer selects the appointee, this appointment still requires the fundamental elements of an agreement to be present. The fact that the appointee is not obligated to accept the appointment is not relevant. It remains that to receive the appointment, the selected faculty member must accept the role, including agreeing to its terms and conditions.

64. By unilaterally implementing the Program and setting its terms and conditions, the Employer has breached the recognition clause of the Collective Agreement. As we have seen earlier in this decision, it is well established that the law recognizes that the consequence of a union's status as the exclusive bargaining agent for its members is that it is granted a monopoly to represent and negotiate on behalf of its members. This being so, the employer cannot bargain directly with the individual employees. Bypassing the Association to negotiate terms and conditions of their appointment with the employees selected for the Chairs of the Program violates this guiding principle of the collective bargaining relationship, Article A-3 of the Collective Agreement, and section 10(1)(b) of the Prince Edward Island *Labour Act*.

65. Again, I reiterate that it is not the creation of the Program that violates the Agreement, but its unilateral implementation, which sets the terms and conditions of the appointment of selected faculty members without these terms and conditions having been negotiated with UPEIFA.

66. This being said, I will now address the second issue raised in this grievance.

(b) If the Collective Agreement is found to be ambiguous as to UPEI's ability to create and implement the UREC program should this ambiguity be resolved in favour of the Employer because of a longstanding past practice of awarding research grants?

67. Since I have determined that by unilaterally implementing the Program and setting its terms and conditions, the Employer has breached the recognition clause of the Collective Agreement, the Employer is now asking me to determine, as an alternative argument, whether the "the Collective Agreement is ambiguous." Should I determine that it is "ambiguous", then the Employer claims is its "longstanding past practice surrounding the awarding of grants" should result in a finding that it has not violated the Collective Agreement.

68. It is clear from the Employer's arguments that it is not using "past practice" to establish an estoppel, and I will not therefore deal with it on that basis. What the Employer is asking me to do is to use "past practice" as an interpretative tool to clarify an ambiguity in the Collective Agreement.

69. As is the case with the interpretation of other contracts, the basic rule in grievance arbitration is that provision of the collective agreements are to be interpreted without resort to "extrinsic evidence"

unless the relevant provision is deemed to be ambiguous. (See, Palmer and Snyder, Collective *Agreement Arbitration in Canada*, 6th Ed. (Snyder), section 2.52). The term "extrinsic evidence" is used to describe evidence that is outside the agreement itself, one example being evidence of past practice.

70. In *United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd*., [1993] 2 S.C.R. 316, at p. 341-42, the Supreme Court of Canada provided the following explanation for this rule:

> The general rule prohibiting the use of extrinsic evidence to interpret collective agreements originates from the parol evidence rule in contract law. The rule developed from the desire to have finality and certainty in contractual obligations. It is generally presumed that when parties reduce an agreement to writing they will have included all the necessary terms and circumstances and that the intention of the parties is that the written contract is to be the embodiment of all the terms. Furthermore, the rule is designed to prevent the use of fabricated or unreliable extrinsic negotiations to attack formal written contracts.

71. To be admissible as an aid to interpretation, past practice evidence must meet the conditions set out in *IAM, Local 1740 v. John Bertram & Sons Co*., (Weiler), 1967 CarswellOnt 782, at paras. 12 and 13 :

> A second use of "past practice" is quite different and occurs even where there is no detrimental reliance. If a provision in an agreement, as applied to a labour relations problem is ambiguous in its requirements, the arbitrator may utilize the conduct of the parties as an aid to clarifying the ambiguity. The theory requires that there be conduct of either one of the parties, as an aid to clarifying the ambiguity. The theory requires that there be conduct of either one of the parties, which explicitly involves the interpretation of the agreement according to one meaning, and that this conduct (and, inferentially, this interpretation) be acquiesced in by the other party. If these facts obtain, the arbitrator is justified in attributing this particular meaning to the ambiguous provision. The principal reason for this is that the best evidence of the meaning most consistent with the agreement is that mutually accepted by the parties. <u>Such a doctrine, while useful, should be quite carefully employed</u>. Indiscriminate recourse to past practice has been said to rigidify industrial relations at the plant level, or in the lower reaches of the grievance process. It does so by forcing higher management or union officials to prohibit (without their clearance) the settling of grievances in a sensible fashion, and a spirit of mutual accommodation, for fear of setting precedents which may plague either side in unforeseen ways in future arbitration decisions. A party should not be forced unnecessarily to run the risk of losing by its conduct its opportunity to have a neutral interpretation of the terms of the agreement which it bargained for.

> Hence it would seem preferable to place strict limitations on the use of past practice in our second sense of the term. I would suggest that there should be (1) no clear preponderance in favour of one meaning, stemming from the words and structure of the agreement as seen in their labour relations context; (2) conduct by one party which unambiguously is based on one meaning attributed to the relevant provision; (3) acquiescence in the conduct which is either quite clearly expressed or which can be inferred from the continuance of the practice for a long period without objection; (4) evidence that members of the union or management hierarchy who have some real responsibility for the meaning of the agreement have acquiesced in the practice.

[The underlining is mine.]

72. Having said this, I also agree with the arbitration board in *Canadian Union of Public Employees, Local 501 v. Charlottetown (City)*, 2012 CanLII 32240 (PE LA), where it stated, at paragraph 75, that ""Past practice" is a problematic interpretive tool." This would explain why the requirements set out in the *John Bertram & Sons Co* decision are so stringent.

73. The first prerequisite to the use of "past practice" as an interpretation guide is that there is an ambiguity in a provision of the collective agreement. The Employer, who is raising the "past practice" argument, did not indicate in its written argument what ambiguity needs to be clarified other than to state that "if the Collective Agreement is found to be ambiguous." It did refer, in its argument to Article A-10, but did not indicate what was the "ambiguity" that it felt needed clarification. It is not for the arbitrator to make this determination. If a party feels that there is an ambiguity it must at least indicate what it is and if the arbitrator agrees that an ambiguity does exist, then it will resort to "extrinsic evidence" to resolve it. In this case, I see no ambiguity in the relevant provision of the Collective Agreement and the Employer did not submit any arguments that would convince that one existed.

74. I agree with the Association that Article A-10 is not ambiguous. Viewed in the labour relation context, I see no ambiguity in the fact that management right is circumscribed by Article A-3. There is no question that management rights must be exercised in a manner that is consistent with the exclusive role of the union as the bargaining agent for its members. This conclusion by itself would be sufficient to deal with this ancillary argument of the Employer.

75. However, for the sake of argument, let's review the Employer's evidence on which it grounds its argument of "past practice." In its written argument, the Employer states that the UPEI has a longstanding history of allocating grants to eligible faculty members to carry out approved research activities. It also

added that the funding for these research activities comes both from external and internal sources. It then provided examples of such research activities going back to at least 2005. The Employer claims that during all this time, it never received a grievance or a notice from UPEIFA that its practice of awarding research funding was unacceptable.

76. It also argued that, although silence alone did not create the "ambiguity," it does constitute "the primary mark that a right… is not specifically circumscribed by a collective agreement." I agree that the third criterion of *John Bertram & Sons Co* does indicate that silence can be construed as tacit approval of a practice if "the practice continues over a long period without objection." In other words, a failure to object to a long-standing practice is a necessary condition for the use of past practice to interpret an unclear term in a collective agreement. Long-term silence on the part of a union can be construed as an unspoken condonation of an employer's understanding of the agreement. Therefore, the question in this case becomes whether or not there was silence on the part of the Union that is sufficient to constitute an approval of the University's understanding of the Collective Agreement.

77. In its response to the Employer's argument regarding "past practice", UPEIFA claims that the parties have negotiated specific language in the Collective Agreement regarding funded Chairs thereby negating the Employer's claim that it had remained silent on the matter. It referred in particular to the following provision of the Collective Agreement : "Article B-2.20 – Externally Funded Chairs", which establishes a process for the appointment of a faculty member to an externally funded chair position; "Article H-1.5 - Teaching Workload Reductions for Scholarly Endeavours and University Service"; and, Article H-1.7 , which provides that faculty members appointed to special externally-funded named Chair positions or similar positions, where the expectation is that the Chair holder will be predominantly involved in research, shall teach the number of courses per year agreed to at the time of the appointment.

78. It also referred to specific terms and conditions regarding the Canada Research Chairs contained in the "Letter of Understanding No 2," which states, in part as follows:

> […] The University and the Association wish to make these opportunities available. In order to do this within the provisions and the intent of the Agreement, the Parties hereby agree to amend some of the procedures outlined in the Agreement specifically between the Agreement and the procedures identified below, the procedures in this Letter of Understanding shall apply.

79. These examples clearly indicate that the parties did not remain silent on the issue, but that they did negotiate terms and conditions for "externally funded" chairs. There was no reason or justification brought forward in the Employer's written submission to explain why such terms and conditions should not or could not be negotiated for the new "internal" Program. The existence in the Collective Agreement of these negotiated terms and conditions for the "externally funded" chair is a major obstacle to the Employer's past practice argument.

80. As stated in Palmer & Snyder, *Collective Agreement Arbitration in Canada*, supra, at section 2.58, "[e]xtrinsic evidence is only of assistance to the arbitrator if it reveals a consensus as to the meaning of the disputed provision. If it is merely compatible with one of the interpretations being proposed, it is of no value in resolving the dispute."

81. In this case, there is no evidence of past practice that reveals a consensus between the parties, which would support the Employer's position that it can unilaterally set and implement the terms and conditions of the appointment of faculty members to the Program.

82. For those reasons, I cannot accept the Employer's argument of "past practice" as an interpretative tool. First of all, there is no evidence of an ambiguity in the provisions of the Collective Agreement that would justify the use of "extrinsic evidence" as an aid to interpretation and, even if there was, the Employer has not been able to convince me that there is in this case a longstanding "past practice."

F. DECISION

83. For the foregoing reasons, the grievance is allowed and:

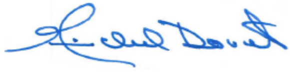
(a) I declare that the Employer, in unilaterally setting the terms and conditions for the appointment of UREC violates Article A-3 of the Collective Agreement; and

(b) If the Employer intends to continue with the Program, then I order that it negotiate a Memorandum of Understanding with UPEIFA outlining the terms and conditions of the appointments of faculty members to UREC.

84. I accept to reserve my jurisdiction with respect to the implementation of the remedy outlined.

Signed, on August 29, 2024,

in Dieppe, N.B.



Michel Doucet
Arbitrator